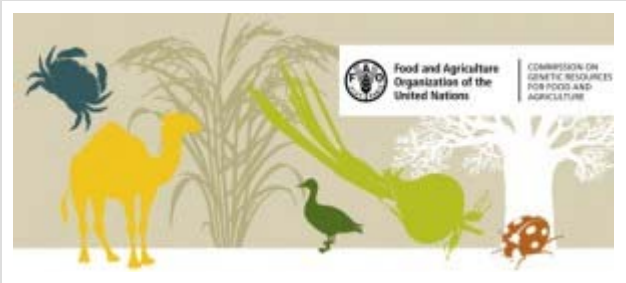
Latest developments relating to benefit-sharing under the Commission on Genetic Resources for Food and Agriculture

Latest developments relating to benefit-sharing under the Commission on Genetic Resources for Food and Agriculture

Posted on **April 27, 2015** by **elsatsioumani**



By Dr Asterios Tsioumanis and Elsa Tsioumani*

In January 2015, the Commission on Genetic Resources for Food and Agriculture (CGRFA) of the UN Food and Agriculture Organization (FAO) endorsed Elements to facilitate the domestic implementation of access and benefit-sharing (ABS) measures designed for different subsectors of genetic resources for food and agriculture. The Elements integrate specific considerations on the fair and equitable sharing of benefits arising from the utilization of genetic resources for food and agriculture, including on the scope of benefit-sharing obligations, what is "fair and equitable", beneficiaries, and the type of benefits to be shared. This blog post will provide an overview of the CGRFA deliberations and a preliminary assessment of the Elements, focusing on benefit-sharing.

Background

The CGRFA is the only permanent forum for governments to discuss and negotiate matters of specific relevance to biodiversity for food and agriculture. The Commission's fifteenth session (CGRFA 15) took place from 19-23 January 2015, in Rome, Italy. In preparation for the session, a team of legal and technical experts on ABS and the Commission's Intergovernmental Technical Working Groups were asked to explore ABS issues for the subsectors of genetic resources for food and agriculture, including plant, animal and forest genetic resources. This work was expected to lead to the adoption of draft elements to facilitate the domestic implementation of ABS for these subsectors of genetic resources, taking into account relevant international instruments on ABS, in particular the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGR) (see previous BENELEX blog posts here and here) and the Nagoya Protocol on ABS (see BENELEX blog

post) to the Convention on Biological Diversity (CBD) (see BENELEX blog post here and here). These elements would serve as a voluntary tool and would not constitute new international ABS instruments (see CGRFA 14 report, p. 8). This specification was made with reference to the provisions of the Nagoya Protocol, which allows its Parties to develop and implement specialized ABS agreements, for instance to regulate specific sectors of genetic resources.

The Commission welcomed the Elements, which will be brought to the attention of the FAO Conference in June 2015.

The ABS elements for genetic resources for food and agriculture – an assessment

Deliberations at CGRFA 15 (see ENB CGRFA 15 coverage) largely focused on procedural matters, namely on whether the Elements would take the form of a distinct resolution, or be integrated in the CGRFA 15 report as is usual practice. Some argued that a resolution would ensure greater visibility for the Elements at the FAO Conference, and thus greater recognition. Others, mainly from the developing world, suggested "welcoming" the Elements in the CGRFA 15 report, arguing that further work is required to focus on the specific subsectors of genetic resources. Eventually, the Elements were integrated in the report – an outcome which makes little difference in legal terms, and does not change the effectiveness of the Elements – along with an invitation to countries to "consider and, as appropriate, make use of" them. Intersessional work will now focus on subsector-specific ABS elements, as well as on the role of traditional knowledge associated with genetic resources for food and agriculture and their customary use.

The final outcome on ABS measures for genetic resources for food and agriculture (Meeting Report, Appendix B) includes general considerations, a section on the international legal framework, and the rationale for ABS measures for genetic resources for food and agriculture. The actual Elements address institutional arrangements, access to and utilization of genetic resources for food and agriculture, access to traditional knowledge associated with genetic resources for food and agriculture, the fair and equitable sharing of benefits, and compliance and monitoring.

Although the document is explicitly recognized as a work in progress (para 25), its immediate usefulness can be argued from three perspectives. First, it is an elaborate post-Nagoya Protocol expression of intergovernmental agreement on the distinctive features of genetic resources for food and agriculture, their importance for food security, and the need for tailor-made ABS solutions. Second, it offers procedural steps to be followed and certain innovative solutions which governments urgently need as they design and implement ABS policies for food and agriculture. Third, it places the topic of ABS for genetic resources for food and agriculture in the context of the evolving international ABS regime, namely the CBD, the Nagoya Protocol and the ITPGR, identifying gaps, open questions potentially to be addressed at the international level, and challenges for national law-makers. We will address these points below, in turn, giving priority to considerations of relevance to benefit-sharing.

On the particularities of genetic resources for food and agriculture

The special nature of genetic resources for food and agriculture, based on their importance for food security and the interdependence of all countries, is already recognized in the context of the CBD (See COP Decision V/5), the preamble to the ITPGR and the preamble to the Nagoya Protocol. The Elements make a step forward by providing specific considerations and options for addressing the distinctive characteristics of genetic resources for food and agriculture. Governments are advised, for instance, to analyze the existing commercial and research practices developed by some subsectors, and take into account relevant national legal frameworks including property law and contract law in order to avoid the creation of additional administrative procedures. It is further explicitly acknowledged that the effective conservation of genetic resources for food and agriculture requires their continued use by farmers, including smallholders, indigenous and local communities, research institutions, breeders and other stakeholders; therefore, ABS measures "should aim at facilitating and actively encouraging the continued use and exchange of genetic resources for food and agriculture and benefit-sharing" (para 22). In addition, national ABS measures should be simple, flexible, and allow for an evolutionary implementation approach to accommodate new situations (para 25), a point which is particularly important in seeking to address the rapid evolution of science and research and development techniques in the field of agricultural production.

The Elements recognize that negotiating the fair and equitable sharing of benefits on a case by case basis through mutually agreed terms (MAT), as required by the Nagoya Protocol, may be impractical and entails high transaction costs. Providers and users are advised to rely on model contractual clauses, standards and other tools developed for their specific sectors or subsectors, a solution which is also encouraged in the context of the Nagoya Protocol (Articles 19 and 20). It is not however explained who would assess whether these pre-existing tools would satisfy the requirements for fairness and equity in ABS transactions.

Fairness- and equity-related considerations could nevertheless be advanced through a number of innovative ideas for benefit-sharing suggested in the Elements as specifically suited for the area of food and agriculture. Among these, the *mutual exchange* of genetic resources for food and agriculture is proposed as an option, as "it would allow for access to genetic resources for food and agriculture without having to negotiate the sharing of monetary benefits and yet offers substantial benefits to both sides" (para 72). In this case, governments would need to address forms of utilization that restrict subsequent access through, for instance, intellectual property rights.

At the same time, options to address the challenge of identifying the proper beneficiaries of benefit-sharing are proposed (see previous BENELEX blog posts for a discussion on beneficiaries in the context of REDD+ and in relation to farmers' rights. It is acknowledged that identifying the beneficiary may be particularly difficult, given that the innovation process in food and agriculture is usually of an incremental nature and based on the contributions of many. Potential solutions include, depending on the circumstances, bilateral negotiations for benefit-sharing through MAT, the establishment of national benefit-sharing funds and the distribution of benefits according to disbursement criteria, or multilateral solutions in the case of multiple countries of origin. The establishment of national benefit-sharing funds could address the case of multiple beneficiaries at the national level, including for instance indigenous and local communities, although the elaboration of disbursement criteria is likely

to pose additional challenges.

Another innovative idea concerns the possibility to conclude framework agreements, which would authorize access to and the utilization of a range of genetic resources, possibly for specific purposes (para 62). This solution could be particularly appropriate for sectors which exchange large numbers of genetic resources. Benefit-sharing arrangements, in this case, could be part of broader research partnership agreements (para 74). Such partnerships could greatly advance non-monetary benefit-sharing, focusing on characterization data, research results, capacity building and technology transfer, which is considered of particular relevance to the food and agriculture sector (para 73).

The Elements as a contribution to the international ABS debate

By placing the sector of genetic resources for food and agriculture in the context of the international ABS regime, the Elements may also advance the international debate on ABS as a whole. The value of the guidance on institutional arrangements, for instance, extends beyond food and agriculture, and could also be useful in the context of the Nagoya Protocol, which does not provide such details on its implementation. The Elements clearly spell out that ABS measures and the designation of one or more national competent authorities would depend on the structure of a State, the form of government, the jurisdictional division of responsibility and the international conventions to which a State is Party. When designing their policy or regulation, governments are advised to take a number of logical steps, including: taking stock of existing and potentially relevant institutions and arrangements; deciding on the allocation of institutional responsibility; putting in place mechanisms for coordination and communication between designated institutions; and publicizing the resulting arrangement.

A clarification is offered concerning the reference to “biological” rather than “genetic” resources in certain national ABS regulations and the often problematic relationship between ABS and trade in commodities, a point which was particularly controversial during the Nagoya Protocol negotiations. Highlighting that “compounds used in the pharmaceutical and cosmetic industry are often extracted from agricultural products sourced through intermediaries from local markets at local prices,” the Elements point to the possible circumvention of ABS regulations when resources acquired as commodities via sales contracts are used for research and development purposes.

Another helpful clarification concerns the distinction between commercial and non-commercial research and development and benefit-sharing. The Elements note that in the case of non-commercial utilization, recipients of material are sometimes given the option not to negotiate the sharing of monetary benefits immediately, “if they agree to get back to the provider and negotiate monetary benefit-sharing, should their intent change” (para 50). To that end, countries are advised to identify triggers to signal when change of intent occurs and how to address it. The provision is useful on two grounds: first, it explicitly recognizes the possibility to negotiate *monetary* benefit-sharing terms at a later stage, notwithstanding the intent of the research at the time of access; second, by making specific reference to “monetary” benefit-sharing, it clearly implies that *non-monetary* benefit-sharing is still expected in the context of non-commercial utilization of genetic resources, including for

instance through the exchange of genetic resources or research results. However, the Elements fall short of proposing specific triggers or checkpoints for a change of intent. Although it is often difficult to distinguish between commercial and non-commercial research, national law-makers could potentially find useful tools through the use of contract law or the intellectual property system.

Finally, a point especially useful to the national legislator concerns the need to clarify whether ABS measures apply only to publicly held genetic resources for food and agriculture, or to privately held resources as well. This observation stems from the fact that the ITPGR Multilateral System (MLS) of ABS applies only to plant genetic resources under the management and control of Parties (as well as to material voluntarily included by other holders), whereas the Nagoya Protocol does not make this distinction. It is imperative for reasons of legal certainty to clearly identify the scope and coverage of national ABS measures.

Ongoing debates – identifying the need for additional guidance

On certain issues, the Elements have not covered much new ground, though they have acknowledged gaps and the need for additional international guidance. On the temporal scope of access measures, for instance, it is recognized that "there is an international debate about the temporal scope national ABS measures could or should have" (para 33). It is noted that the Nagoya Protocol does not prevent its Parties from applying their national ABS measures to utilizations or access to genetic resources that fall outside its scope, but that Parties cannot necessarily rely on the support of user country compliance measures with regard to those resources. Governments are then laconically advised to "be clear as to which genetic resources for food and agriculture are covered by the relevant access provisions" (para 36). At the same time, ABS measures should be clear with regard to benefit-sharing arising from new or continued uses of genetic resources and associated traditional knowledge (para 66), but governments are to "consider carefully the implications of expanding the scope of their ABS measures to previously accessed genetic resources for food and agriculture or traditional knowledge," which could arguably lead to "considerable uncertainty" regarding the status of such resources and discourage potential users (para 67). The reasons for this are not explained further. However, it can be argued that national measures could provide for benefit-sharing obligations, at least with regard to new uses of previously accessed material, without creating doubts about the ownership status of the material or additional administrative burdens, through the careful design and delimitation of the subject matter and the use of checkpoints.

Useful, albeit not conclusive, specifications are offered with regard to the definition of the "utilization" of genetic resources in the food and agriculture sector. In that regard, it is noted that in practice it is often difficult to distinguish research and development from agricultural production destined for sale and human consumption. Noting the need for further technical guidance to facilitate the implementation of national ABS measures, the Elements suggest that such measures could list examples of activities and purposes that fall under or outside the definition of utilization.

Finally, the Elements offer little, but do point to the need for further guidance, on traditional

knowledge associated with genetic resources for food and agriculture, as well as on how to obtain the prior informed consent (PIC) of indigenous and local communities, including cases of shared traditional knowledge (para 64). In that regard, it is noted, without further specifications, that “the community PIC, as such, is a challenging, even though not completely new concept” (para 41). Future work on this point is expected to provide additional insights from the food and agriculture sector, which could potentially also prove useful in the broader context of biodiversity and human rights law.

Outlook

Following the highly politicized negotiation processes of the Nagoya Protocol and the ITPGR, it should come as no surprise that many countries are cautious in developing specialized ABS instruments for genetic resources for food and agriculture. On the long and winding road towards international ABS regulation, the Commission attempts to strike a balance on the basis of cooperation and mutual reinforcement with other international instruments, in particular the Nagoya Protocol and the ITPGR. Focusing on the provision of science-based guidance for implementing ABS for genetic resources for food and agriculture falls well within the frame of the Commission’s technical nature. The current version of the Elements already serves this purpose, and further work on pending items may well prove to be valuable both inside and outside the Commission’s realm. Intergovernmental assessment of the Elements is expected to be undertaken, for instance, at the sixth session of the ITPGR Governing Body, due to convene in October 2015, as well as the second meeting of the Parties to the Nagoya Protocol, in December 2016.

A number of the innovative elements identified above are of particular interest to the BENELEX research project, and we will continue following the work of the Commission and other ABS-related instruments with interest, sharing our questions and findings. The explicit recognition of mutual exchange of genetic resources as a non-monetary benefit, for instance, is of great importance. Using this as a starting point, our academic endeavors will focus on the interaction between the exchange of resources as a benefit in itself and other forms of monetary and non-monetary benefit-sharing in the context of the quest for equity in international law: is the exchange of resources sufficient to generate more general benefits such as food security and sustainable agriculture objectives? Or is the achievement of such objectives also linked to the transfer of relevant information, technologies and research capacities?

* Asterios is a guest blogger for the BENELEX project.

This entry was posted in **Uncategorized** by **elsatsioumani**. Bookmark the **permalink [http://www.benelexblog.law.ed.ac.uk/2015/04/27/benefit-sharing-under-the-commission-on-genetic-resources-for-food-and-agriculture/]** .